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Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong & Soo Hock Seang (for and on behalf of the estate of Soo Boon Kooi) & Ors

B HIGH COURT (PULAU PINANG) — CIVIL SUITS NO 22–159 OF 1995 AND 22–317 OF 1995
RAUS SHARIF J
18 MARCH 2005

C *Companies and Corporations — Suit against company — By founder of company and its predecessor, a partnership — Partnership property — Whether company was merely an extension of partnership — Whether company's properties belonged to partnership*

D *Companies and Corporations — Suit against company — By founder of company and its predecessor, a partnership — Whether defendant companies had separate existence from partnership — Whether defendant companies were incorporated for tax saving and investment for mutual benefits*

E *Companies and Corporations — Suit against company — By founder of company and its predecessor, a partnership — Whether defendant companies' equity structure shall at all times be apportioned and maintained between plaintiff and first defendant at 50 : 50 basis*

Companies and Corporations — Suit against company — By founder of company and its predecessor, a partnership — Whether first defendant director had committed fraud on plaintiff in incorporating defendant companies

F The plaintiff and the first defendant were brothers. The first defendant died in the midst of this trial. Upon his death the first defendant's estate was represented by his two sons, who were the administrators of the estate. The plaintiff started his business in 1955. He then proceeded to operate his business as a sole proprietorship under the name and style of Soo Chew Trading. Soo Chew Trading subsequently became a partnership business when the first defendant G joined the plaintiff on an equal basis. Soo Chew Trading was registered as a partnership. In the course of the partnership business, several trademarks were registered in different classes in respect of infant goods and household products traded and/or distributed by the partnership with the trademarks registry, Malaysia and also with other regional trademarks registries in the H neighbouring countries for the benefit of the partnership. In the course of and with the expansion of the partnership business, the plaintiff and the first defendant incorporated four companies ('the defendant companies'), one of which was SCT. Sometime in 1989, the plaintiff and the first defendant as partners of the partnership transferred the business of the partnership to SCT. I As the result of the transfer, the partnership ceased all businesses and since then, SCT had assumed the goodwill and business of the partnership. Sometime towards the end of 1993, the Department of Inland Revenue, ('IRD') initiated

investigations into the financial affairs of the partnership business and of the defendant companies. The plaintiff contended that shortly after the investigations by IRD he discovered that the share allotments and the transfer of the partnership funds were contrary to his rights and interests. He then requested the first defendant to rectify the share equity and for an account of the finances and assets of the defendant companies. The plaintiff contended that the first defendant had not only refused to accede to his request but had instead threatened to dismiss him and/or to terminate or curtail his authority, powers, rights, entitlements, interests, benefits and privileges as governing director, director and shareholder of the defendant companies.

Held, dismissing the plaintiff's claim and allowing the defendant's claim:

(1) The defendant companies were incorporated as part of the partnership's business expansion and not for the sole purpose of tax savings and investments. The defendant companies have separate existence from the partnership. The principal activities of each of the defendant companies were contained in their respective memorandum of association (see para 54). The plaintiff had failed to discharge the burden of proving that there was an agreement between him and the first defendant that the defendant companies were incorporated for the purpose of tax saving and investment for their mutual benefits (see para 55).

(2) There was no oral agreement made between the plaintiff and the first defendant or representation by the first defendant to the plaintiff that the four defendant companies' equity structure shall at all times be apportioned and maintained between the plaintiff and the first defendant be on 50 : 50% basis (see para 127).

(3) The plaintiff had full knowledge of, and consented to the incorporation and affairs of the four defendant companies. The first defendant had not committed fraud on the plaintiff in incorporating the defendant companies (see para 127). The plaintiff's allegation of fraud must be examined in light of the background of his business experience, the hundreds of documents executed by him and his unrestricted access to the defendant's companies and partnership at all times. The plaintiff had signed all the circular board resolutions approving the allotment of new shares to others. He himself had signed a number of share certificates for other shareholders in the defendant's companies. He cannot now turn around to say that he did not know what he was signing (see para 74).

(4) Both the plaintiff and the first defendant had been freely withdrawing monies from the partnership funds for their own personal benefits. Thus, whatever properties or shares purchased, were not partnership properties (see para 127).

[**Bahasa Malaysia translation**

Plaintif dan defendan pertama adalah adik beradik. Defendan pertama meninggal dunia semasa perbicaraan kes ini. Selepas kematiannya, harta pusakanya diwakili oleh dua orang anak lelakinya, yang menjadi pentadbir harta pusaka tersebut. Plaintif memulakan perniagaannya dalam tahun 1955. Beliau menjalankan perniagaannya sebagai tuanpunya tunggal di bawah nama dan gaya Soo Chew Trading. Soo Chew Trading kemudiannya menjadi perniagaan perkongsian apabila defendan pertama bergabung dengan plaintif secara sama rata. Soo Chew Trading didaftarkan sebagai sebuah perkongsian. Di sepanjang perniagaan perkongsian tersebut, beberapa tanda niaga telah didaftarkan dalam berbagai kelas yang berbeza dengan pejabat pendaftar tanda niaga, Malaysia dan juga dengan berbagai pejabat pendaftar tanda niaga di negara-negara jiran berhubung dengan barangan bayi dan barangan rumah yang diniagakan dan/atau diedarkan oleh perkongsian tersebut, untuk kepentingan perkongsian tersebut. Perniagaan perkongsian tersebut berkembang dan plaintif serta defendan pertama menubuhkan empat buah syarikat ('syarikat-syarikat defendan') salah satu syarikat ini adalah SCT. Dalam tahun 1989, plaintif dan defendan pertama sebagai rakan kongsi telah memindahmilikkan perniagaan perkongsian tersebut kepada SCT. Akibat dari pindahmilik ini, perkongsian tersebut telah memberhentikan semua urusniaga dan sejak itu, SCT telah mengambil alih nama baik serta urusniaga perkongsian tersebut. Pada akhir tahun 1993, Jabatan Hasil Dalam Negeri ('IRD') memulakan penyiasatan ke atas urusan kewangan perniagaan perkongsian tersebut dan syarikat-syarikat defendan. Plaintif mengatakan bahawa sejurus selepas penyiasatan oleh IRD beliau mendapati bahawa untukan saham dan pindahan dana perkongsian tersebut bertentangan dengan hak dan kepentingannya. Beliau meminta defendan pertama membetulkan ekuiti saham dan memberi penerangan mengenai butir kewangan dan aset-aset syarikat defendan. Plaintif mengatakan bahawa defendan pertama bukan hanya tidak mahu menurut permintaannya akan tetapi sebaliknya mengugut untuk memecatnya dan/atau menamatkan atau menyekat kuasa, hak, kepentingan, faedah dan keistimewaannya sebagai pengarah urusan, pengarah dan pemegang saham syarikat-syarikat defendan.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan defendan:

(1) Syarikat-syarikat defendan ditubuhkan kerana perkembangan perniagaan dan bukannya bertujuan utama untuk penjimatan cukai dan pelaburan. Syarikat-syarikat defendan mempunyai kewujudan yang berasingan dari perkongsian tersebut. Aktiviti-aktiviti setiap syarikat-syarikat defendan terkandung di dalam memorandum syarikat masing-masingnya (lihat perenggan 54). Plaintif telah gagal untuk melepaskan beban untuk membuktikan bahawa terdapat satu perjanjian di antara beliau dan defendan pertama yang bahawa syarikat-syarikat defendan ditubuhkan untuk tujuan penjimatan cukai dan pelaburan untuk kepentingan bersama mereka (lihat perenggan 55).

(2) Tiada perjanjian lisan dibuat di antara plaintif dan defendan pertama atau representasi oleh defendan pertama kepada plaintif bahawa struktur ekuiti keempat-empat syarikat defendan pada setiap masa diagih di antara plaintif dan defendan pertama pada kadar 50 : 50% (lihat perenggan 127).

(3) Plaintif mempunyai pengetahuan penuh dan bersetuju dengan penubuhan dan urusan-urusan keempat-empat syarikat defendan itu. Defendan pertama tidak melakukan fraud ke atas plaintif dengan menubuhkan syarikat-syarikat defendan (lihat perenggan 127). Dakwaan plaintif mengenai fraud hendaklah dikaji berdasarkan latarbelakang pengalaman perniagaan beliau, ratusan dokumen-dokumen yang disempurnakan olehnya dan aksesnya yang tiada batasan kepada syarikat-syarikat defendan dan perkongsian tersebut. Plaintif telah menandatangani kesemua resolusi berkeliling lembaga pengarah yang membenarkan untukan saham baru kepada pihak lain. Beliau sendiri telah menandatangani sijil saham untuk pemegang saham yang lain di dalam syarikat-syarikat defendan. Beliau sekarang tidak boleh berpaling dan mengatakan yang beliau tidak tahu menahu apa yang beliau telah tandatangani (lihat perenggan 74).

(4) Kedua-dua plaintif dan defendan telah secara bebas mengeluarkan wang dari dana perkongsian untuk kegunaan peribadi mereka. Dari itu, apa-apa harta atau saham yang dibeli, bukan harta perkongsian (lihat perenggan 127).]

Notes

For cases on suit against company generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 836–837.

Cases referred to

Amichand v Jawahirmal 32 IC 853 (refd)
Dorchester Finance Co Ltd v Stebbing [1989] BCLC 498 (refd)
Hai-O Enterprise Bhd v Nguang Chan @ Nguang Chan Liquor Trader (a firm, intervening) [1992] 4 CLJ 1985 (refd)
Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors [1996] 5 MLJ 345 (refd)
Ponnukon v Jebaratnam [1980] 1 MLJ 282 (refd)
Saunders v Anglia Building Society [1970] 2 All ER 961 (refd)
Wan Salimah bte Wan Jaffar v Mahmood Bin Omar (Anim bte Abdul Aziz, intervener) [1998] 5 MLJ 162 (refd)
Wong Sang Giat v Wong Keng Gik [1999] 1 MLJ 551 (refd)

Legislation referred to

Companies Act 1965 ss 169, (5), (16)
Evidence Act 1950 s 114(g)
Partnership Act 1961 ss 22, 23

JA Yeoh (Shearn Delamore & Co) for the plaintiff.
Wong Chong Wah (Lim Chee Wee and Lim Koon Huan with him) (Skrine) for the defendants.

Raus Sharif J:

INTRODUCTION

[1] Two civil suits, involving the same parties were filed in Penang High Court. In Civil Suit No 22–159 of 1995 Soo Boon Siong @ Saw Boon Seong, the plaintiff sued:

(i) Soo Boon Kooi @ Saw Boon Kooy, the first defendant;
(ii) Soo Chew Trading Sdn Bhd, the second defendant ('SCT');
(iii) Doctor Baby (M) Sdn Bhd the third defendant ('Doctor Baby');
(iv) Laguta Sdn Bhd, the fourth defendant ('Laguta'); and
(v) Corsame (M) Sdn Bhd the fifth defendant ('Corsame');

with regard to the partnership affairs of Soo Chew Trading and the above named four defendant companies. The suit was filed on 11 July 1995.

[2] In Civil Suit No 22–317 of 1995, the first defendant and SCT sued the plaintiff in the abovementioned suit as a defendant (for ease of reference, the definition used for the parties in suit No 22–159 of 1995 will also be used for suit No 22–317 of 1995) for the ownership or assignment of various trademarks registered either in the sole name of the plaintiff, the joint names of the plaintiff and the first defendant or the partnership. This suit was filed on 16 June 1995.

[3] The two suits were consolidated by an order of the court made on 30September 1996.

[4] The trial of the suits lasted over 38 days. The witnesses who testified for the plaintiff were Soo Boon Seong @ Saw Boon Seong (PW1), Lee Kim Tee (PW2), Goh Ban Tiek (PW3), Soo Li Lih (PW4), Ng Peng Kian (PW5) and Kong Hwan Kwan (PW6). For the defendants, the witnesses who testified were Saw Fatt Seong (DW1), Soo Hock Seang (DW2), Kong Kooi Lean (DW3) and Kong Kooi Wah (DW4).

[5] The parties have also filed 31 bundles of documents which have been marked as bundles A to Z and AA to AE.

FACTS

[6] The plaintiff and the first defendant were brothers. The first defendant died on 19 June 2001 in the midst of this trial. Upon his death the first defendant's estate is represented by his two sons, Saw Fatt Seong and Soo Hock Seang who are the administrators of the estate pursuant to grant of letters of administration made on 27 November 2001.

[7] The plaintiff started his business in 1955 when he was 22 years old with a small stall on a five foot way selling assorted kinds of goods. He then proceeded to operate his business as a sole proprietorship registered on 1September 1957 under the name and style of Soo Chew Trading. For some five years thereafter, Soo Chew Trading was engaged in trading and distributing of general merchandise including toiletries, baby products and household plastic products.

[8] Soo Chew Trading subsequently became a partnership business when the first defendant joined the plaintiff on an equal basis. Soo Chew Trading was registered as a partnership on 1 September 1963 ('the partnership'). In the application for business registration in Form B, it was stated that the partnership was formed for the purpose of 'Dealer in General Good and Piece Good'. But in reality the partnership assumed and continued with the business of the sole proprietorship and was engaged in the business of trading and distribution of general merchandise covering assorted household products including plastic products, toiletries and infant products.

[9] In the course of the partnership business, several trademarks were registered in different classes in respect of infant goods and household products traded and/or distributed by the partnership with the trademarks registry, Malaysia and also with other regional trademarks registries in the neighbouring countries for the benefit of the partnership.

[10] The first defendant has three sons. The three sons joined the partnership officially on the following dates:

(i) Saw Fatt Seong on 28 June 1969;

(ii) Saw Chin Seong on 1 February 1973; and

(iii) Soo Hock Seang on 1 May 1977.

[11] The first defendant's three sons started working for the partnership at a young age and without being paid any salary before the official dates of their employment. Saw Chin Seong passed away on 18 September 1994.

[12] The plaintiff has three children, two girls and a boy. The plaintiff's children were academically inclined and went on to study for professional degrees overseas. The eldest, Soo Li Lih, graduated with a Bachelor of Commerce Degree from the Business School, Nikon University Tokyo, Japan. She stayed in Tokyo, Japan for five years to complete her tertiary education. Upon graduation in 1989, she left for Los Angeles, USA and started a company known as Monterey International (Monterey) to export infant products to Malaysia and Singapore. She returned to Malaysia and started working with SCT as an executive officer in October 1993 with a monthly salary of RM3,000. The second child, a son, Soo Fuat Jaw studied in United States of America (USA) and qualified as an Architect. The youngest, a daughter, Soo Hwa Li was sent to USA to study when she was eleven. When she finished high school in USA

at 18, she came back to study at a private international college in Penang before going to Australia for her degree.

[13] In the course of and with the expansion of the partnership business, the plaintiff and the first defendant incorporated four companies:

(i) Corsame on 7 May 1976;

(ii) SCT on 20 December 1976;

(iii) Laguta on 4 December 1979; and

(iv) Doctor Baby on 10 September 1982.

[14] The plaintiff and the first defendant were the founding directors and shareholders of the defendant companies. Over the course of the years, new directors were appointed and shares were allotted to new shareholders.

[15] Sometimes in 1989, the plaintiff and the first defendant as partners of the partnership transferred the business of the partnership to SCT. As the result of the transfer, the partnership ceased all businesses and since then, SCT had assumed the goodwill and business of the partnership.

[16] In pursuant of the transfer of the partnership's business, the plaintiff had consented and caused to assign several trademarks in respect of infant goods and household products in different classes registered in the joint names of the plaintiff and the first defendant trading as Soo Chew Trading to and for the benefit of SCT .

[17] The partnership accounts were properly maintained and duly certified by the partnership's accountants, initially M/s Yeap Geok Lake & Co and subsequently, M/s Looi Soo Wah & Co.

[18] The defendant companies, when they were incorporated had their accounts properly maintained and audited by the following auditors:

(i) SCT, by M/s Yeap Geok Lake & Co from 1976 to 1981, M/s Looi Soo Wah & Co from 1982 to 1991 and KPMG Peat Marwick from 1996 to 1997.

(ii) Doctor Baby by M/s Looi Soo Wah & Co from 1982 to 1983, 1993 to 1994 and in 1997. KPMG Peat Marwick took over from 1995 to 1996;

(iii) Laguta, by M/s Looi Soo Wah & Co from 1979 to 1984 and from 1985 to 1995. KPMG Peat Marwick took over from 1996 to 1997; and

(iv) Corsame, by M/s Looi Soo Wah & Co from 1979 to 1984 and from 1985 to 1995. KPMG Peat Marwick took over from 1996 to 1997.

[19] Most of the partnership accounts and the defendant companies' yearly accounts were signed by both the plaintiff and the first defendant. The directors'

reports in respect of the annual accounts for the defendant companies were all signed by the plaintiff and the first defendant.

[20] The appointment of directors and allotment of shares in the defendant companies were approved by circular board resolutions and signed by both the plaintiff and the first defendant.

[21] The bank accounts of the partnership and the defendant companies were jointly operated by the plaintiff and the first defendant. The plaintiff and the first defendant had always shared the same office when they were partners and later on when they were directors of the defendant companies. Both of them had equal access to cheque books and both of them had the right to issue and sign cheques singly without the signature of the other. As a result, large sum of money had been issued by the plaintiff and the first defendant for different purposes and to different persons.

[22] The plaintiff had withdrawn large sums of money from the partnership to pay to the following persons namely: Margaret Wu/Wu Chu Mei; Tsai Lian Shen; Hwang Kin Bang and himself. The plaintiff had also withdrawn large sum of money from the partnership to pay Ping Hong Enterprise, which according to him was for the purpose of buying foreign currency.

[23] The first defendant had also withdrawn monies from the partnership accounts to pay to his three sons as well as himself.

[24] All these withdrawals by the plaintiff and the first defendant took place between 1990 and 1993. The total amounts withdrawn from the partnership by the plaintiff and the first defendant were approximately the same.

[25] In the course of the partnership business several landed properties were purchased and registered, some in the personal name of the plaintiff, some in the personal name of the first defendant, some in the joint names of the plaintiff and the first defendant and some in the names of the defendant companies. Over the course of the years, public quoted shares were also purchased.

THE DISPUTE

[26] Sometime towards the end of 1993, the Department of Inland Revenue, (IRD) initiated investigations into the financial affairs of the partnership business and of the defendant companies. The plaintiff contended that shortly after the investigations by IRD he discovered that the share allotments and the transfer of the partnership funds were contrary to his rights and interests. He then requested the first defendant to rectify the share equity and for an account of the finances and assets of the defendant companies.

[27] The plaintiff contended that the first defendant had not only refused to accede to his request but had instead threatened to dismiss him and/or to

terminate or curtail his authority, powers, rights, entitlements, interests, benefits and privileges as governing director, director and shareholder of the defendant companies.

[28] Following the confrontation between the plaintiff and the first defendant over the share allotments, finances and assets of the partnership and the defendant companies, the employment of the plaintiff's daughter, Soo Li Lih (PW4) as executive officer of the SCT was terminated sometime in November 1994. Sometime in May 1995, the plaintiff's mandate as signatory of the defendant companies' bank accounts was terminated. On or about 3 July 1995, SCT issued a letter terminating payment of all salaries and expenses due to the plaintiff with effect from 1 July 1995.

[29] Following the above events the plaintiff filed Civil Suit No 22–159 of 1995. Immediately after that, on or about 13 July 1995, the plaintiff obtained an ex-parte order of injunction against the defendants from, amongst other things, determining the authority, powers, rights, entitlements, interests, benefits and privileges of the plaintiff, including his monthly salary and expenses, whether as governing director, director or shareholder and from rescinding the plaintiff's mandate as a signatory of the defendant's bank account. The ex-parte order was confirmed on 21 December 1995.

[30] The first defendant and SCT had, one month earlier than the plaintiff's suit, filed the Civil Suit No 22–317 of 1995, claiming for the ownership or assignment of the various trademarks registered either in the sole names of the plaintiff, the joint names of the plaintiff and the first defendant or the partnership.

ISSUES AND FINDINGS

A Civil Suit No 22–317 of 1995

Trademarks

[31] Bundle E contains the various certificates of registration of the trademarks. As stated earlier these trademarks were registered in the sole name of the plaintiff, in the joint names of the plaintiff and the first defendant and in the name of the partnership. The trademarks were registered with the trademarks registry in Malaysia and the registries in the neighbouring countries. With regard to these trademarks, the plaintiff and the first defendant had executed 10 different Deeds of Assignment to assign to SCT at least 22 trademarks which were registered either in the name of the plaintiff, or in the joint names of the plaintiff and the first defendant. In addition to these Deeds of Assignment, the five directors of the SCT had signed a circular board resolution dated 1 August 1989, to accept assignment of fourteen trademarks which are different from the Deeds of Assignment.

[32] It is the contention of the defendants that, since the partnership had ceased business in 1989, and by virtue of non-use by the partnership, all the trademarks should be assigned to SCT.

[33] The plaintiff contended otherwise. It is the plaintiff's contention that the trademarks registered in the sole name of the plaintiff, in the joint names of the plaintiff and the first defendant and in the name of the partnership, whether with the trademarks registry, Malaysia and elsewhere outside Malaysia do belong exclusively to the plaintiff and the 1st defendant as partners of the partnership.

[34] The plaintiff in his evidence testified that in 1964 he had started registering trademarks of the partnership business, getting the ideas from other registered products such as Dr West and Colgate and of his personal involvement in the registration and renewal of trademarks, including attending and giving instruction to the lawyers in Malaysia and the neighbouring countries. With regard to the assignment of the trademarks to SCT, the plaintiff contended that they were assigned for the mutual benefit of the plaintiff and the first defendant as the only shareholders of SCT and holding shares on an equal basis having regard to the following:

(i) The Deeds of Assignment were effected in 1989 and thereafter following the transfer of the partnership business to SCT effective from 1 January 1989 because 'the assignment would help SCT's business';

(ii) the consideration for the assignment as provided for the Deeds of Assignment was a mere nominal consideration in accord with the intention underlying the assignment to mutually benefit the plaintiff and the first defendant;

(iii) in the decision to transfer the partnership business to SCT effective from 1 January 1989, it was agreed between the plaintiff and the first defendant as partners of the partnership that the assets of the partnership were not to be transferred and SCT do 'takeover the business operations, excluding assets and liabilities of the partnership, with effect from 1 January 1989.

[35] Hence, the plaintiff contended that he had every reason to refuse to sign the trust deeds for the transfer of the trademarks to SCT Similarly, according to the plaintiff, the first defendant and SCT cannot prevail upon the plaintiff to honour the Deeds of Assignment in respect of the trademarks, let alone transfer the remaining trademarks, whether registered in the sole name of the plaintiff or otherwise when the share equity in SCT and the remaining companies does not correspond with the shares in the partnership.

[36] The defendants on the other hand contended that the plaintiff's contentions are plainly unsustainable in lights of the following facts:

(i) Although the various trademarks were registered either in the name of the plaintiff, the plaintiff and the first defendant or the partnership, since the cessation of the business of the partnership, SCT has been paying for the expenses of renewal of these trademarks;

(ii) it is SCT who manufacture or sells goods bearing the trademarks;

(iii) SCT as assignee had taken over the registration of at least 36 registered trademarks from the plaintiff and first defendant.

[37] Thus, it is submitted by the defendants that the law requires the owner of a trademark to use the trademark on goods and services. According to the defendants, the partnership no longer use the trademarks. Thus, by virtue of non-use by the partnership, all trademarks should be assigned to SCT which is currently using the trademarks.

[38] The law on the issue of ownership of a trademark is sufficiently clear. In the leading High Court decision of *Hai-O Enterprise Bhd v Nguang Chan @ Nguang Chan Liquor Trader (a firm, intervening)* [1992] 4 CLJ 1985, it was held by Shankar J (as he then was) that:

> In its most elementary form the owner of the trademarks would be the trader whose connection is indicated by the use of the marks. That trader would be the owner of the mark is common law.

[39] Thus, the law is, whoever used the mark should be the owner of the mark. From the evidence in this case, it is SCT which is currently using the trademarks for its trading purposes. SCT is the trader of all the trademarks as they have dealing with those marks by manufacturing or selling goods bearing those trademarks. No doubt the said trademarks were first used by the partnership but presently, they are being used by SCT for its trading purposes. The plaintiff in his evidence during cross-examination, in fact, agreed that goods bearing the said trademarks were sold by SCT. He also testified that when the partnership ceased operation the trademarks were taken over by SCT. Further, the plaintiff also agreed that SCT was the party for paying the renewal of the trademarks.

[40] It is my finding that it was the intention of the plaintiff and the 1st defendant that SCT to become the proprietor of the trademarks. By virtue of the Deeds of Assignment executed by the plaintiff and the 1st defendant between 1989 and 1992, the plaintiff had consented and agreed to transfer the trademarks to SCT. All the Deeds of Assignment were signed by the plaintiff. Thus, the oral evidence of the plaintiff to the contrary is inadmissible to contradict these Deeds.

[41] Accordingly I allowed the claims by the defendants in Civil Suit No 22–317 of 1995 that the various trademarks registered either in the name of the plaintiff, the joint names of the plaintiff and first defendant or the partnership

be assigned to SCT and the plaintiff to execute the Deeds of Assignment of the said trademarks to SCT.

B Civil Suit No 22–159 of 1995

Issues and Findings

[42] As stated earlier, the plaintiff and first defendant had incorporated four companies namely Corsame, SCT, Laguta and Doctor Baby.

[43] Corsame was incorporated on 7 May 1976. On 18 May 1976, by a circular board resolution the plaintiff was appointed as Managing Director, Pua You Kam as Chairman, Phun Yau Sing as General Manager and first defendant as cashier. All four of them were directors of Corsame. From the very outset, by a circular resolution dated 18 May 1976 all the four directors were allotted 10,000 shares of RM1 each. By a circular resolution dated 1 July 1976 shares were allotted to Saw Chin Seong and Ng Peng Kian, the nephew of the plaintiff and the first defendant and two other persons.

[44] SCT was incorporated on 20 December 1976. The founding directors and shareholders were the plaintiff and the first defendant. By a circular board resolution dated 15 May 1985, the following were appointed as additional directors:

(i) Saw Fatt Seong, first defendant's son;
(ii) Saw Chin Seong, first defendant's son;
(iii) Soo Hock Seang, first defendant's son;
(iv) Ng Peng Kian, nephew of plaintiff and first defendant;
(v) Madam Lee Kian Tee, plaintiff's wife;
(vi) Madam Khoo Siew Hong, Saw Fatt Seong's wife;
(vii) Madam Cheah Geok Eng, first defendant's wife;
(viii) Madam Kong Kooi Wah, Saw Chin Seong's wife.

[45] All of them were allocated shares of SCT.

[46] Laguta was incorporated on 4 December 1979. The founding directors and shareholders of Laguta were the plaintiff and the first defendant. By a circular board resolution dated 28 March 1981 the following were allocated shares in Laguta:

(i) Saw Chin Seong;
(ii) Saw Fatt Seong;
(iii) Soo Hock Seang;
(iv) Mdm Cheah Geok Eng;
(v) Mdm Khoo Siew Hong;
(vi) Mdm Lee Kim Tee;
(vii) Mdm Kong Kooi Wah.

[47] By a circular board resolution dated 30 June 1982, the above-named persons were appointed as additional directors.

[48] Doctor Baby was incorporated on 10 September 1982. The founding directors and shareholders were the plaintiff as well as the first defendant. By a circular board resolution dated 1 October 1982, the following were allocated shares in Doctor Baby:

(i) Saw Fatt Seong;

(ii) Saw Chin Seong;

(iii) Soo Hock Seang;

(iv) Ng Peng Kian;

(v) Mdm Lee Kim Tee;

(vi) Mdm Cheah Geok Eng;

(vii) Mdm Khoo Siew Hong; and

(viii) Mdm Kong Kooi Wah.

[49] By a circular board resolution dated 5 October 1982, the above-named persons were also appointed additional directors of Doctor Baby.

Were the companies set up for tax savings and investments

[50] It is the plaintiff's contention that there had been an agreement between the plaintiff and the first defendant that the defendant companies were set up for purpose of tax saving and investments for the mutual benefit of the plaintiff and the first defendant and to complement and/or take over the business activities of the partnership. According to the plaintiff, the defendant companies have remained essentially the investment companies for the partnership, acquiring landed properties and shares in private companies paid from the partnership funds. Thus, according to the plaintiff all the defendant companies have landed properties registered in their names except for Laguta which have investments by way of share equity in private companies.

[51] According to the plaintiff, save for Corsame which was involved in the cosmetics business on a limited scale between 1976 and 1993 and SCT which commenced business when it took over the partnership business in1989, none of the defendant companies were engaged in any active business, remaining essentially the investment companies for the partnership.

[52] The defendants on the other hand had submitted that there was no such agreement between the plaintiff and the first defendant that the defendant companies were set up for purposes of tax savings and investments. Instead, according to the defendants, the defendant companies were incorporated as part of the partnership's business expansion.

[53] On the evidence adduced, it is my finding that the companies were engaged in active business. The contention of the plaintiff that there had been an oral agreement between the plaintiff and the first defendant that the defendant companies were incorporated for tax savings and investments is completely unfounded. Apart from the evidence of the plaintiff, there is no other evidence supporting the plaintiff. On the contrary, we have the annual accounts of Doctor Baby, Laguta and Corsame which were all properly audited by approved auditors, which over the years showed that business was carried out by these companies. Kong Kooi Lean, (DW3) stated in her evidence that business was carried out by Corsame, Laguta and Doctor Baby. When she was challenged, she produced invoices and delivery orders to support her evidence. Thus, I have no reason to reject her evidence. She had been with the partnership since July 1975, as a general clerk. Subsequently she was employed by SCT when the business of the partnership was transferred to SCT in 1989. Thus, she had full knowledge of the day to day purchasing and trading of the partnership and the defendant companies.

[54] From the evidence, it can been seen that the defendant companies have separate existence from the partnership. The principal activities of each of the defendant companies are contained in their respective memorandum of association. Their principal activities are not inconsistent with those activities referred to in the respective annual audited accounts of the defendant companies, which have been expressly approved by the plaintiff in writing. The plaintiff cannot now alleged that the defendant companies were incorporated and managed for purposes contrary to such express statement in the companies documents.

[55] In short, the plaintiff had failed to discharge the burden of proving that there was an agreement between him and the first defendant that the defendant companies were incorporated for the purpose of tax saving and investment for their mutual benefits. The evidence showed the contrary.

[56] Thus, it is my finding that the defendant companies were incorporated as part of the partnership's business expansion. The defendant companies were not incorporated for tax savings and investments as alleged by the plaintiff.

Was there an agreement and/or representation that the share equity in the defendant companies be maintained on an equal basis

[57] It is the plaintiff's contention that there had also been an agreement between the plaintiff and the first defendant and/or representation from the first defendant to the plaintiff that the share equity in the defendant companies shall at all times be apportioned and maintained between the plaintiff and the first defendant as shareholders therein on an equal basis consistent with the equal shares in the partnership.

[58] However, the evidence adduced in this trial do not support the plaintiff's assertion. The plaintiff himself admitted both in his cross-examination and re-examination that this issue was never raised by him with the first defendant at all. It was never raised in the management meetings. Even when the dispute had arisen sometime in December 1994, the plaintiff did not raise this allegation. The first time that this allegation was raised was when the statement of claim was filed by the plaintiff on 11 July 1995. To me, if the oral agreement was so important to the plaintiff, it should have been made known to the first defendant, and the first defendant family members and the plaintiff's own family members as well. But, there is no such evidence of this at all.

[59] Furthermore, the plaintiff alleged that the oral agreement was sometime in 1989. This was well after the defendant companies had been incorporated, and by 1989 numerous new shareholders and directors had been added. The plaintiff, by then had signed hundreds of documents such as resolutions, minutes, accounts and share certificates for the partnership and the defendant companies. These documents do not indicate that share equity between the plaintiff and the first defendant is to be on equal basis. All the circular board resolutions approving the appointments of directors and allotments of new shares to others beside the plaintiff and the first defendant were signed by the plaintiff. The names of all the directors were openly indicated in the resolutions.

[60] Further, the accounts of all the defendant companies, which were all properly audited made no reference to such an arrangement. Instead, all the accounts of the defendant companies clearly stated who the shareholders were and are in the defendant companies and the defendant has never challenged these audited accounts. In fact, most of the partnership accounts and the defendant companies yearly accounts were signed by the plaintiff as well as the first defendant. The director's reports in respect of the annual account for the defendant companies were signed by the plaintiff and the first defendant.

[61] In *Saunders v Anglia Building Society* [1970] 2 All ER 961 at p 973 it was held that:

> A person who signs a document and parts with it so that if may come into other hands, has a responsibility, that a normal man of prudence to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor.

[62] The same position is taken in the local cases of *Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* [1996] 5 MLJ 345 at p 352 and *Wan Salimah bte Wan Jaffar v Mahmood Bin Omar (Anim bte Abdul Aziz, intervener)* [1998] 5 MLJ 162. In *Wan Salimah*, Abdul Malek Ishak J held that:

> It is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[63] In the present case, the plaintiff himself signed a number of share certificates for other shareholders in the defendant companies. Thus, he is bound by the documents that he signed. Moreover the annual accounts of the four defendant companies were properly audited showing clearly that the shareholders of the defendant companies are those stated in these accounts. These audited accounts have never been challenged by the plaintiff. The secretary, Mr Kong Hwan Kwan, (PW6) who has been and still is the secretary of the defendant companies for all the material years, was not, at the trial even asked by the plaintiff on this issue. In fact, PW6, a witness called by the plaintiff was shocked to learn of the allegation made by the plaintiff against the first defendant. PW6 during the cross-examination stated he was surprised by the allegations of fraud as alleged in the statement of claim.

[64] In conclusion, the evidence in this case do not support the plaintiff's assertion that there has been an agreement between the plaintiff and the first defendant or representation by the first defendant to the plaintiff that the share equity in the defendant companies should be apportioned as between the plaintiff and the first defendant on an equal basis. It is my finding that there is no agreement between the plaintiff and the first defendant or representation by the first defendant to the plaintiff that the share equity in the defendant companies shall at all times apportioned and maintained as between the plaintiff and first defendant as shareholders on equal basis.

Was there any breach of the agreement and/or representation on the part of the first defendant

[65] Since it is my finding that there is no agreement between the plaintiff and the first defendant or representation by the first defendant to the plaintiff that the share equity in the defendant companies shall at all times apportioned and maintained as between the plaintiff and the first defendant as shareholders on an equal basis, the issue of breach of such agreement or representation does not arise at all.

Legitimate Expectation

[66] It is the plaintiff's submission that independently of any agreement as between the plaintiff and the first defendant and/or any representation on the part of the first defendant, the plaintiff would, at any rate, have a legitimate expectation that for as long as the defendant companies are for purposes of tax saving and investments and are to complement and/or to take over, if needed be, shall always have a share equity in the defendant companies consistent and corresponding with his share in the partnership. But as stated earlier the incorporation of the defendant companies were not for the purpose of tax saving and investment. Therefore, the issue of legitimate expectation does not arise.

Fraud and misrepresentation

[67] It is the plaintiff's submission that the first defendant had committed fraud and/or misrepresentation on the plaintiff in relation to the incorporation of the four companies.

[68] It would require a stretch of imagination to hold that the first defendant had committed fraud and/or misrepresentation on the plaintiff. To me, the plaintiff knew what he was doing. He knew the purpose of the incorporation and affairs of the defendant companies. This can be seen from the resolutions and minutes approving the transfer of shares and changes in the share equity that he signed. The plaintiff had signed the documents over 17 years, that is, from 1976 to 1994.

[69] It is my finding the plaintiff had knowingly signed all the documents, including the resolutions for the allotment of shares and the appointment of family members as directors. It is very difficult for me to believe that the plaintiff did not know the contents of the resolution to which he had signed all these years and had only realized it sometime in 1993, the year his daughter Soo Li Lih returned to Malaysia that there were other shareholders/directors in the defendant companies apart from himself and the first defendant. It appears to me, these allegations surfaced only in 1994, when the relation between the plaintiff and the first defendant had deteriorated.

[70] To me, the plaintiff knew all along that there were other directors and shareholders of the defendant companies beside himself and the first defendant. My reasons are:

(1) He had admitted that he did sign the resolution pertaining to Corsame directors' resolution dated 18 May 1976 whereby 10,000 shares each were allotted to himself, first defendant, Phun Yau Sing (Phun) and Pua You Kam (Pua);

(2) He has further confirmed that Phun and Pua were two other directors in Corsame and they were his friends and when Corsame was formed in 1976, they were the four original shareholders.

(3) In his letter dated 29 May 2003 to IRD he expressly acknowledge that Lee Kim Tee, his wife is a shareholder of the defendant companies.

[71] The above facts and evidence clearly show that the plaintiff knew of the defendant companies shareholders and directors well before the IRD investigation in October 1993.

[72] No doubt that more shares were allotted to the first defendant's family members when compared to the plaintiff's family members, but the plaintiff cannot ignore the fact that the first defendant's children were working for the partnership and the defendant companies by their involvement in their business activities for over 20 years. The shares according to the evidence of Saw Fatt

Seong and Soo Hock Seang, were allotted to them pursuant to the assurance by the plaintiff and the first defendant. The plaintiff knew and has in fact, acknowledged the first defendant's childrens' contribution in his evidence when he said:

> I agree the first defendant's children started working for the partnership at very young age.

[73] Thus, the contention of the plaintiff that the resolutions were not signed knowingly by him with intent to allot or transfer the shares is obviously untenable in the light of overwhelming evidence to the contrary. It is near to impossible to believe that such a seasoned businessman and well traveled person like the plaintiff would have had no knowledge of the allotment and transfers of shares when he had attended, if not all, management meetings of the defendant companies.

[74] To me, the plaintiff's allegation of fraud must be examined in light of the background of his business experience, the hundreds of documents executed by him and his unrestricted access to the defendant's companies and partnership at all times. The plaintiff had signed all the circular board resolutions approving the allotment of new shares to others. He himself had signed a number of share certificates for other shareholders in the defendant's companies. He cannot now turn around to say that he did not know what he was signing.

[75] Even if one accepts for the moment that the plaintiff did not read these documents, he would then have acted negligently and would be precluded from relying on his defence of *non-est factum*. In *Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* at p 352, it was held:

> a plea of *non-est factum* is not available in favour of a person who has shown himself to be negligent. He has only himself to blame for signing the blank guarantee forms.

[76] In *Saunders v Anglia Building Society*, Lord Wilberforce went further and said:

> I would add that the onus of proof in this matter rests upon him (that is) to prove that he acted carefully, and not upon the third party to prove contrary.

[77] In the present case, the plaintiff has, in his evidence, admitted that he had not read the documents and had not asked the clerk about the documents. To me, if the plaintiff have had exercised reasonable care in performance of his duties as a director, he would have had reasonably discovered or become fully aware of the contents of the resolutions. Thus, he has only himself to blame for signing the documents without reading or ascertaining the content of the documents that he was signing.

Was there breach of duty of good faith

[78] The plaintiff submitted that the first defendant had also committed a breach of his duty of good faith as a partner to the plaintiff. But to me, the

plaintiff cannot content that he and the first defendant was still carrying on as partners in the affairs of the defendant companies. The plaintiff is a director of the defendant companies and thus has a duty to account to the Board of Directors. It is not incumbent upon the first defendant to explain everything to the plaintiff over the affairs of the companies. In fact the first defendant's duty of good faith is owed to the companies rather than to the plaintiff.

[79] In *Dorchester Finance Co Ltd v Stebbing* [1989] BCLC 498 at pp 501 Foster J states:

> A director is required to take in the performance of his duties such care as ordinary man might be expected to take on his own behalf.

[80] At pp 501–502 the learned Judge states:

> A director is required to exhibit in the performance of his duties such degree of skill as may reasonably be required from a person with his knowledge and experience.

[81] Thus, in the present case, the plaintiff as a director is expected by law to use his knowledge and experience when he assumes his role as a director. By virtue of his duty as a director, the plaintiff is not entitled to rely entirely on the first defendant. In any event there is no evidence except from the words of the plaintiff that the plaintiff had relied entirely on the first defendant in relation to the defendant companies.

[82] From the evidence, I do not find that the plaintiff had to rely entirely on the first defendant in affairs of the partnership as well as the defendant companies. To me, for the plaintiff to claim that he had to rely on the first defendant is an understatement. Compared to the first defendant, the plaintiff is more educated and experience than the first defendant. The plaintiff had traveled overseas, doing business in Thailand, Taiwan, Singapore and other countries in the region. He had formed companies overseas, registered trademarks overseas as well as in Malaysia.

[83] My finding is that the plaintiff is not illiterate in English, as he claimed to be. In his evidence he claimed that he could not read and write in English. But when he gave evidence in court, there were instances, he proceeded during cross-examination to answer some questions before the questions were even translated to Mandarin. In fact, there is a letter he signed in English. As such, I am unable to accept the plaintiff's claim that he had to rely entirely on the first defendant in the affairs of the partnership and subsequently on the four defendant companies.

[84] In any event the first defendant's duty of good faith is owed to the companies rather than to the plaintiff.

No consideration

[85] The plaintiff submitted that the resolutions for allotment of shares to the first defendant's family members and the documents were without

consideration. The plaintiff alleged that he had received nothing in return for the allotments nor had the family members paid anything, whether in cash or kind, in consideration for the shares allotted. Again, the plaintiff's allegation on this issue is contrary to the evidence adduced. According to evidence, the four defendant companies had created shareholders' and directors' current accounts in their book. These were created as a form of savings for them and money kept in these accounts were subsequently used to pay for shares purchased by them.

[86] The workings of the current accounts to pay for the shares allotments was adequately explained and substantiated by Kong Kooi Lean (DW3) who has personal knowledge of the accounts and the finances of the defendant companies. She testified:

> … The individual salaries and the respective individuals with directors fees, were not paid out but credited into the individual accounts of the four defendant companies.
>
> There is no need for cash payment into the current accounts. It was done by direct debit into the accounts. The documents are complete to show payments are the same with regard to Boon Seong and Boon Kooi's shareholding in the respective defendant companies.

[87] In addition, the first defendant's sons, DW1 and DW2 have testified that their salaries maintained in the current accounts have been used to pay for their shares in the defendant companies.

[88] Furthermore, the annual accounts of the defendant companies, which have been properly audited show clearly that they had been paid in full. These audited accounts were never challenged by the plaintiff. The defendant companies' secretary Kong Hwan Kwan (PW6) was not at the trial asked or challenged on this issue.

[89] In fact, the plaintiff knew the existence of the current account as evidenced by his own two letters he and his wife wrote to IRD, in which he had conveniently requested the IRD to allow him to make use of his wife's current accounts in the defendant companies to pay for the income tax that was due to them. The letters were written well before the problem between the plaintiff and the first defendant. Thus, the allegation by the plaintiff that the shareholders' and directors' accounts were false cannot be true. This allegation is again without basis in light of clear evidence to the contrary as stated above.

[90] In conclusion, in light of the evidence, it is my finding that there was no agreement between the plaintiff and the first defendant that the defendant companies were for purposes of tax savings and investments for the mutual benefit of the plaintiff and the first defendant. It is also my finding that there is no agreement between the plaintiff and the first defendant or representation

by the first defendant to the plaintiff that the share equity in the defendant companies shall be apportioned and maintained as between the plaintiff and the first defendant as shareholders therein on equal basis consistent with equal shares in the partnership. The plaintiff had signed circular resolutions approving the appointments of directors and allotment of new shares to others beside the plaintiff and the first defendant. In the circumstances, the plaintiff would be estopped from claiming that he had no knowledge of what had transpired over the years.

[91] Hence, the plaintiff's prayer that the first defendant is obliged to hold the shares in the defendant companies as presently allotted and issued in his name in trust of the plaintiff and to indemnify the plaintiff to the extent of the difference between the share equity at 50% in the defendant companies which the plaintiff would have been entitled is unsustainable and thus rejected. The plaintiff and the wife are only entitled to the share equity of the defendant companies as to the amount registered under their names.

Partnership property

[92] Section 22 of the Partnership Act 1961, defines 'partnership property' as all properties, and the rights and interest in such property, originally brought into the partnership stock (that is at the time of the formation of the partnership) or acquired subsequently by the partnership, whether through purchase or other means, on account of the partnership or for the purposes and in the course of the partnership business.

[93] Further, s 23 of the same Act provides that 'unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm'.

[94] *Halsbury's Laws of Malaysia* (Vol 9) Administrative Law, Partnerships, stated that where a property is purchased with partnership money, there is a general presumption that it is the intention of the partners to treat that property as partnership property, even if the purchase of the property is in the name of or by one partner only.

[95] On the same issue *Lindley & Banks on Partnership* (18th Ed, 2002) citing the observation of Lord Lindley stated:

> The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership monies; for in such a case he will be deemed to hold the property in trust for the firm, unless he can show that he holds it for himself alone. Upon this principle it has been held that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust, and signed by the partner to whom the land has been conveyed. So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company

in the name of the partner only, and although it may be contrary to the company's deed of settlement for more than one person to hold shares.

Landed properties in the name of the plaintiff, first defendant and joint names of the plaintiff and first defendant.

[96] It is the plaintiff's submission that the landed properties purchased and registered in the individual names of the plaintiff and the first defendant and in their joint names between 1963 and 1989 are partnership property. The plaintiff is referring to the following properties:

(i) Six properties registered in his name (bundle B pp 228–229);

(ii) Two properties (undivided shares) registered under his name (bundle B — pp 229–230);

(iii) Three properties registered in the name of the first defendant (bundle B — pp 230–231 and bundle AB — p 506);

(iv) Nine properties (undivided shares) registered in the name of first defendant (bundle B — p 230 – bundle AB — p 506); and

(v) Two properties registered in the joint names of the plaintiff and the 1st defendant (bundle B — p 228).

[97] The plaintiff is seeking a declaration that the above properties are properties of the partnership having regard to the following, namely:

(i) that, not unlike the reasons for setting up of the defendant companies for purposes of tax savings and investments, the said properties were not and could not have been purchased and registered other than for the mutual benefit of the plaintiff and the first defendant;

(ii) that, the purchase of the said property was funded and paid for wholly by way of funds belonging to the partnership as apparent from the cheque counterfoils 1993;

(iii) that, throughout the years of the partnership business up to 1989, the year of the transfer partnership business to SCT, profits of the partnership, though very substantial, had not been apportioned or distributed as between the plaintiff and the first defendant and that consequentially, neither the partners did or could have the financial means to justify or support the purchase of the said properties;

(iv) that, as testified by the plaintiff, the first defendant could not have the financial means of his own to acquire the said properties as 'before the establishment of the partnership, my brother did not own any property. He got nothing then, he was renting a room at Jalan Yoke Keow. He had only RM10,000. He told me, he had only RM10,000 to contribute to the partnership business';

(v) that, as testified by the plaintiff 'Soo Boon Kooi had never informed me that the properties registered in my names are my personal properties and that the properties registered in his name are his personal properties' and that all documents of title to the said properties, including the documents of title to the properties purchased and registered in the name of the plaintiff, have always been kept by the first defendant personally;

(vi) that, save for the rental from the single storey terrace house known as No 32, Tingkat Kerapu 4, 13400 Butterworth which was collected by the plaintiff, the income from the said properties whether through rentals or otherwise had always been collected and managed by the first defendant on behalf of the partnership.

[98] The defendants submitted that, since partnership monies had from time to time, by mutual consent of the plaintiff and the first defendant, been withdrawn from the partnership and later converted into property to be owned by the individual partner, the court has to presume such properties are not partnership property. According to the defendants as both the plaintiff and the first defendant had been freely withdrawing monies from the partnership funds for their own personal needs, these monies no longer constitute partnership funds.

[99] It is clear law that the intention of the partners is the chief criteria in determining partnership property and all the surrounding circumstances must inevitably be taken into account. As held by the Federal Court in *Ponnukon v Jebaratnam* [1980] 1 MLJ 282 and applied in *Wong Sang Giat v Wong Keng Gik* [1999] 1 MLJ 551, pp 551–559 that if no such intention can be inferred the property is a separate property. In *Amichand v Jawahirmal* 32 IC 853, pp 853–855, it was held that where portions of partnership assets have from time to time, by mutual consent, been withdrawn from the partnership and converted into property to be owned by partners, the court held that such were no longer partnership property.

[100] Thus, the presumption that assets purchased with partnership money constitute partnership property may be rebutted.

[101] The evidence in this case shows clearly that both the plaintiff and the first defendant had free and absolute access to the cheque books. Infact, the plaintiff admitted that both he and the first defendant withdrew substantial sums of money using the same cheque books with only a few cheques in between cheques by each other. Both the plaintiff and the first defendant had been withdrawing monies from the partnership funds until the partnership ceased business in 1989. Thus, I am in agreement with the defendants that since the partners had been freely withdrawing monies from the partnership funds for their own personal needs, these monies no longer constitute partnership funds. It follows that when these monies were converted into property, the property cannot be said to belong to the partnership.

[102] It is also evidenced, through the plaintiff, his wife Mdm Lee Kim Tee (PW2) and daughter Soo Li Lih (PW4) that the plaintiff had remitted or use monies for the following purposes:

(i) to purchase landed properties in Thailand;

(ii) to form companies in Thailand, Singapore and California, USA;

(iii) to purchase an apartment in Los Angeles, California, USA costing USD220,000 which was registered in the name of Soo Li Lih and Soo Fuat Jaw;

(iv) to educate Soo Fuat Jaw in architecture in USA and Soo Li Lih in Business Administration in Nikon University of Tokyo, Japan and provide for their subsistence allowance and accommodations;

(v) to send the third child, Soo Hwa Li to USA for high school and later fund her private education at an International College in Penang and then later on to Australia to further her education;

(vi) to maintain his wife Mdm Lee Kim Tee for over seven years of stay in USA for looking after the children there.

[103] It is also evidenced that the plaintiff had remitted large sum of money to Margaret Wu/Wu Chu Mei, Tsai Lian Shen, Huang Kin Bang and to other persons abroad unknown through Ping Hong Enterprise. According to the plaintiff these monies were remitted to or through these persons to meet the shortfall of purchase price of goods invoiced by SCT. According to the plaintiff the under-declaration was allegedly made to save customs duties.

[104] I am unable to believe the plaintiff's story that the monies remitted to the said persons abroad through Ping Hong Enterprise were to meet the shortfall of purchase price of goods invoiced by suppliers. Firstly, according to Kong Kooi Lean, (DW3), these persons were never known or shown in the record books of the partnership or SCT as suppliers of goods to the partnership or SCT. Saw Fatt Seong (DW2) in his evidence, was not aware of such persons being suppliers of the partnership or SCT. Secondly, the plaintiff could have called these persons to give evidence on his behalf to support his story. According to the plaintiff, the proprietor of Ping Hong Enterprise, one Lim Eng Kim, resides in Jalan Delima, Penang is a personal friend of his. LimEng Kim could have been easily called by the plaintiff to give evidence. The failure of the plaintiff to call any of them especially Lim Eng Kim as witness leave this court with no choice but to draw adverse inference against the plaintiff that their evidence would not be favourable to the plaintiff. Section 114(g) of the Evidence Act 1950 applies here. Thus, the only conclusion that this court can make with regard to the remission of monies overseas by the plaintiff, was to finance his activities overseas. The plaintiff cannot deny that he too had been withdrawing monies from the partnership for his own personal benefits.

[105] There is no doubt that the first defendant could not have purchased the properties from his own funds. Neither could the plaintiff. The purchases must have come from the partnership funds. But as pointed earlier, it does not necessarily becomes partnership properties. Looking at the list of properties purchased, it can be seen that the eight properties were registered under the name of the plaintiff, nine under the name of the first defendant, while two properties under joint names of the plaintiff and the first defendant. Looking at the even distribution, my conclusion is that there is no intention between the partners for the said properties to belong to the partnership. Both the plaintiff and the first defendant must have used the profit from the partnership to purchase the properties. This explains why throughout the years of the partnership business up to 1989, the profits of the partnership had not been apportioned between or distributed to the plaintiff and the first defendant. Thus, there appear to be an arrangement between the plaintiff and the first defendant that they had mutually agreed to withdraw monies from the partnership for their own personal benefit, as part of their share of the partnership funds. Such arrangements has been confirmed by the first defendant's family members in the course of their testimonies.

[106] In fact, the evidence indicated that the plaintiff knew that the first defendant had purchased landed property with his own money. On 3 February 1984, the plaintiff executed a circular resolution for SCT to purchase a property known as Lot 1462, Section 2, Town of Butterworth from the first defendant for the sum of RM140,000. In August 1986, the first defendant further sold two pieces of properties to the company for a total sum of RM950,000. The plaintiff again executed the relevant resolutions for the acquisition. Such paperwork would not have been necessary if such properties were partnership properties.

[107] Accordingly, I am unable to accede to the plaintiff's request to declare that the landed properties purchased and registered in the individual names of the plaintiff and the first defendant and in their joint-names between 1963 and 1989 were partnership properties.

[108] It is my finding, both the plaintiff and the first defendant had been freely withdrawing the partnership funds for their own personal needs. Thus, whatever property purchased and registered in the individual names of the plaintiff or the first defendant are their properties and not partnership properties.

Shares in the name of the first defendant

[109] It is for similar reasons that I am unable to declare that the shares in Heng Lean Development Sdn Bhd purchased and registered in the name of the first defendant are the properties of the partnership. Likewise, a declaration sought by the plaintiff that all public quoted shares purchased and registered in the name of the first defendant between 1963 and 1989 and thereafter, including the shares of HSBC Holdings public and shares quoted on the

Kuala Lumpur Stock Exchange and on foreign bonuses, are properties of the partnership, is refused for the same reasons. To me, the presumption that properties purchased with partnership monies constitute partnership property has been rebutted by instances of both the plaintiff and the first defendant freely withdrawing partnership funds for their own personal benefits, an arrangement known only to them.

Landed properties in the name of the defendant companies

[110] It is the plaintiff's submission that the landed properties purchased and registered in the names of the defendant companies between 1963 and 1989 are partnership property. With respect, I am unable to agree. To me, from the evidence adduced, it is my finding that the landed properties purchased and registered in the name of the companies are not partnership property. The plaintiff alleged that none of the defendant companies were in any active or gainful business in order to be able to purchase the properties registered under their names prior to 1989. But as stated earlier the annual account of the defendant companies which were all properly audited by the approved auditors, over the years shows that business was carried out by these companies. The plaintiff and first defendant had affirmed on oath that the account were a true and fair view of the results of the business and were correct pursuant to ss 169(5) and (16) of the Companies Act 1965. The plaintiff cannot claim now that the accounts are not true. If this court is to accept the plaintiff's assertion that these accounts were untrue, then the plaintiff must have sworn a false declaration which is an illegal act. Surely, this court cannot lend its aid to the plaintiff.

[111] In Chitty at para 17–007 at p 836 it is stated as follows:

> 'The principle of public policy' said Lord Mansfield, 'is this: *ex dolo malo non orifur action*. No court will lend its aid to a man who found his course of action upon an immoral or illegal act. If, from the plaintiff's own stating otherwise, the course of action appears to arise *ex turfi* cause, or the transgression of a positive law of this country, there the court says he has no right to be assisted'.

[112] Chitty goes on to say at p 840 as follows:

> The *ex turfi* cause defence as was stated by Kerr LJ in *Euro-Diam Ltd v Bathurset* rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances, it would be an affront of public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.

[113] In conclusion, it is my finding that there was never an intention of both the plaintiff and the first defendant that they intended all the assets of the defendant companies to belong to the partnership.

Landed properties and shares in the names of family members of the first defendant

[114] It is my findings that landed properties and shares in the name of family members of the first defendant as well on the plaintiff's family members do not constitute partnership property. As stated earlier the presumption that assets purchased with partnership monies constitute partnership property may be rebutted. In this case it has been duly rebutted by instances of both the plaintiff and the first defendant freely withdrawing partnership funds for their own personal benefits, an arrangement known only to the plaintiff and the first defendant.

Shares in Heng Lean Development Sdn Bhd in the names of family members of the first defendant

[115] It is for the same reason that the shares in Heng Lean Development Sdn Bhd in the names of the family members of the first defendant do not constitute partnership property.

Landed Property (Los Angeles, USA Apartment) in the names of family members of the plaintiff

[116] The apartment in Los Angeles, USA was purchased and registered in the names of Soo Li Lih and Soo Fuat Jaw, the children of the plaintiff. The apartment was purchased at a price of US220,000 the initial deposit of US70,000 paid for by the plaintiff from the sale of Bangkok properties and the subsequent deposit of US30,000 paid by the plaintiff's wife from her own fund and the balance purchase price of US120,000 from the partnership account through Ping Hong Enterprise.

[117] The plaintiff stated that he has no intention to treat the said apartment as his property and has testified that for convenience, the property was registered in the names of his children, though the property belongs to the partnership. I am unable to accept the plaintiff's assertion. This is because of the fact that:

(i) Soo Li Lih has admitted that her brother Soo Fuat Jaw has used the said property as a collateral for his own personal loan without obtaining his father's consent;

(ii) Soo Fuat Jaw is the one who is keeping the title to this property;

(iii) Soo Li Lih reiterated during cross-examination that the property belong to her father but when asked as to whether she and Soo Fuat Jaw had obtained consent from the plaintiff to obtain the said loan, answered in the negative;

(iv) The plaintiff's family has been occupying and still occupy the property;

(v) When Soo Li Lih came back to Malaysia in 1993, she admitted that the other members of the plaintiff's family were occupying the property;

(vi) Both Soo Fuat Jaw and Soo Li Lih had dealt with the property. Soo Li Lih gave half share in the property to Soo Fuat Jaw as a gift so that both of them becomes the co-owner of the property. (The property was originally registered in Soo Li Lih's name).

[118] It is clear from the evidence that the said property is used as the plaintiff and his family's residence in USA. The sole purpose of the property is to facilitate the plaintiff and his family's well-being in USA and is not intended for the purpose of the partnership. Thus, the property is not a partnership property.

[119] The evidence of the plaintiff in respect to the purchase of the said property indicated that the plaintiff, like the first defendant had withdrawn money from the partnership funds for the purpose of purchasing properties for their own purpose. From the plaintiff's own admission he had also purchased properties in Bangkok, Thailand. This confirm my believe that there is an arrangement between the plaintiff and the first defendant on the withdrawal of the partnership funds for their own personal benefits. The sum withdrawn by both of them as indicated earlier, are more or less the same amount.

Monies transferred by the first defendant to himself and monies in the bank accounts of the first defendant

[120] The same reason applies to the money in the bank account of the first defendant. It does not belong to the partnership as both the plaintiff and the first defendant had freely withdrawn partnership funds for their own personal benefits, an arrangement known only to them.

Monies transferred by the first defendant to his family members

[121] Again the monies transferred by the first defendant to his family members do not constitute partnership property. The plaintiff and the first defendant had freely withdrawing partnership funds for their own personal benefits. The amount withdrawn by them are more or less the same amount.

Income Tax

[122] It is the plaintiff's submission that the first defendant or SCT are obliged to pay to IRD for the plaintiff's share of the tax and penalties imposed by the IRD on the grounds of tax improprieties committed by the partnership over the years. The IRD had levied a sum of RM1,459,000 on the plaintiff's as his share of the tax and penalties in respect of the understatement of income tax on the part of the partnership for the years 1981 to 1989 and a further sum of RM66,491.70 for the years of assessment 1995–1997. The plaintiff had paid a sum of RM50,000 from his own savings derived from his

monthly salary, a sum of RM892,729.60 by way of installments from his current accounts in the companies and a sum of RM264,986.10 and RM23,400 from the current account of his wife and daughter Soo Li Lih respectively. There is a sum of approximately RM294,374 currently outstanding.

[123] The plaintiff's submission that the first defendant and/or SCT are obliged to pay to the IRD the plaintiff's share of the tax and penalties imposed for the following reasons:

(i) that throughout the years of the partnership business up to 1989, the year of the transfer of the partnership business to SCT, the partnership had never declared any profits for distribution to the plaintiff and the first defendant as partners;

(ii) that the second defendant which had taken over the partnership business of Soo Chew Trading effective from 1 January 1989 or, for that matter the other three companies, had similarly never declared any dividend for the plaintiff and the first defendant;

(iii) that the plaintiff had testified that the partnership had paid over the years for the plaintiff's income tax and that even after the transfer of the partnership business in 1989, the plaintiff's income tax was still being paid on his behalf;

(iv) that the tax returns for or on behalf of the said partnership of Soo Chew Trading, including the plaintiff's personal tax returns over the years, had been prepared, submitted and paid for on his behalf by the first and second defendants as 'the accounts and monies were controlled by him and that besides …. all matters relating to tax savings would be done by him';

(v) that although payments had been made progressively to the Department of Inland Revenue by the second defendant on behalf of the plaintiff from his current accounts in the defendant companies, these monies were essentially monies derived from the partnership funds considering that as late as 1992 partnership funds were still being transferred to the defendant companies;

(vi) that all the defendants had been able to settle in full the tax arrears and penalties pursuant to their respective agreements with the Director General of Inland Revenue and that it is more than likely that these payments were in fact, payments made from funds either belonging to the partnership or to the second defendant considering that the purported payments by the respective defendant companies had not been disclosed as 'the cheque counterfoils in respect of the payments had been destroyed'.

[124] The defendants submitted that they are not obliged to settle the plaintiff's income tax for it is a personal liability.

[125] I am in agreement with the defendants. Income Tax is a personal liability. There is no evidence in this case, that there is an arrangement between the plaintiff and the first defendant that their income tax are to be paid from the partnership funds or by SCT, after the partnership business was transferred to SCT. In fact, the plaintiff in his testimony, with regard to income tax stated 'I know it is a personal liability'. Clearly, the plaintiff understand his personal liability as evidenced by the letter he wrote to IRD dated 16 January 1987. The letter reads:

> I refer to your above notices on the deduction of tax from my wife, Lee Kim Tee and my emoluments from Ms Soo Chew Trading Sdn Bhd and Laguta Sdn Bhd respectively, and would like to appeal to your good self to waive the said directions and allow us to settle our tax liabilities on the issuance of notices of assessment. Our past records showed that we had always settled our income tax liabilities on time.
>
> Hence, I shall be grateful if you could kindly allow us to settle our tax liabilities in the manner mentioned above taking into consideration our good past records.

[126] From the above said letter, clearly the plaintiff had been paying his personal income tax. It is evidenced as stated earlier that the defendant companies created the shareholders' and directors' current accounts and that money kept in these accounts belong to them and hence the payment of income tax through these accounts. From the evidence, the plaintiff, at all material times, knew the arrangement of these accounts and did not hesitate to utilise his current account for purposes of income tax payment. The three letters, the plaintiff, his wife and daughter Soo Li Lih, wrote to the IRD on 25 September 2000, are clear evidence that the plaintiff was fully aware of the arrangement of the usage of the shareholders' and directors' current accounts created by the companies. One of the purposes is to settle the directors' tax liability, which is a personal liability. Thus, it is my finding that the defendants are not obliged to settle the plaintiff's income tax.

CONCLUSION

[127] Based on the evidence adduced, the plaintiff has totally failed to prove his allegations against the defendants. The inevitable conclusion from the evidence presented is that:

(a) The defendant companies were incorporated as part of the partnership's business expansion and not for the sole purpose of tax savings and investments;

(b) There was no oral agreement made between the plaintiff and the first defendant or representation by the first defendant to the plaintiff that the four defendant companies' equity structure shall at all times be apportioned and maintained between the plaintiff and the first defendant be on 50 : 50% basis;

(c) The plaintiff had full knowledge of, and consented to the incorporation and affairs of the four defendant companies. The first defendant had not committed fraud on the plaintiff in incorporating the defendant companies;

(d) Both the plaintiff and the first defendant had been freely withdrawing monies from the partnership funds for their own personal benefits. Thus, whatever properties or shares purchased, are not partnership properties; and

(e) The defendants are not obliged to settle the plaintiff's income tax.

[128] In the premises, the plaintiff's claim in suit No 22–159 of 1995 is dismissed. The interim injunction dated 21 December 1995 is hereby dissolved.

[129] As stated earlier, the first defendant's claim in suit No 22–317 of 1995 is allowed.

[130] The plaintiff to bear the costs of these actions.

Plaintiff's claim dismissed. Defendant's claim allowed.

Reported by Peter Ling